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# THE FTC HOLDER IN DUE COURSE RULE: A RULE WITHOUT A PRIVATE REMEDY

Jim L. Banks

## I. INTRODUCTION

A consumer purchases an appliance from a local dealer. The consumer signs a credit contract in which he agrees to make monthly payments, and the dealer agrees to make repairs in case of a breakdown within one year. In addition, the consumer signs a promissory note, believing it to be just another part of the contract.<sup>1</sup> The appliance dealer sells the promissory note to a finance company. A few months later, when the appliance breaks down and the dealer refuses to repair it or the dealer has gone out of business, the consumer ceases making payments. The finance company sues the consumer in state court. The consumer is shocked when the court rules in favor of the finance company, finding it immune to all but "real" defenses<sup>2</sup> because it is a holder in due course<sup>3</sup> of a negotiable instrument<sup>4</sup>—the promissory note signed by the consumer.

In this scenario the finance company's status as a holder in due course of a negotiable instrument protected it from defenses of the consumer. The result would have been the same in two other situations: (1) if the sales contract had contained a waiver of defenses clause<sup>5</sup> (which would have given it the same effect as a negotiable instrument), and (2) if the appliance dealer had referred the consumer to the finance company for a direct loan to pay for the appliance. All three of these methods separate the seller's duty to

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1. In many instances the promissory note is attached to the bottom of the sales contract by perforation. After the consumer signs it, it is detached and sold to a financier.

2. "Real" defenses are enumerated in the Uniform Commercial Code § 3-305 (1977) [hereinafter cited as UCC]: infancy, incapacity or duress, misrepresentation as to the terms of the instrument, and discharge in bankruptcy. "Personal" defenses, from which the holder in due course is immune, are: lack of consideration, unconscionability, fraud in the inducement, and breach of warranty. J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 487 (1972).

3. A holder in due course is a holder who takes the instrument for value and in good faith and without notice that it is overdue or has been dishonored or of any defense or claim to it on the part of any person. UCC § 3-302 (1977).

4. To be a negotiable instrument, the instrument must: (1) be signed by the maker, (2) contain an unconditional promise to pay a sum certain in money and no other promise, (3) be payable on demand or at definite times, and (4) be payable to order or bearer. UCC § 3-104 (1977).

5. Waivers of defenses are allowed by UCC § 9-206 (1977). An example of a typical waiver of defenses clause is: "Buyer agrees not to assert any claim or defense which he may have against the seller as a defense in any action brought by the seller's assignee."

perform from the buyer's duty to pay.<sup>6</sup>

All three methods by which financiers are protected from consumers' claims and defenses have been the target of various legislative and judicial attempts to remove consumer credit transactions from the world of commercial negotiable instruments. Unfortunately, the Montana Supreme Court has taken such action only on a limited basis.<sup>7</sup> In addition, the Montana statutes on consumer protection are, at best, ambiguous, and it is not clear whether there is adequate protection.<sup>8</sup>

In 1975 the Federal Trade Commission (FTC) promulgated its holder in due course regulation, which preserves consumers' claims and defenses.<sup>9</sup> The rule preserves these rights by requiring a notice in all consumer credit contracts. The notice states that the holder of the contract is subject to all claims and defenses which the debtor could assert against the seller. Unfortunately, the FTC holder in due course regulation has a loophole in its enforcement mechanism. The rule does not give an individual a private right to enforce compliance with the rule in either federal or state courts. Moreover, the prospects of enforcement by the FTC on an individual level are not encouraging.<sup>10</sup>

This comment discusses the need for a private cause of action for the Montana consumer in situations where, contrary to the FTC rule, the consumer credit contract does not include the notice to holders.<sup>11</sup>

## II. HISTORY OF THE HOLDER IN DUE COURSE DOCTRINE

In England, in 1758, a promissory note drawn on the Bank of England was stolen and later sold to a legitimate merchant for a fair price. Both the original owner and the subsequent purchaser made a demand for payment on the note. To protect the growing commercial paper market, the English court<sup>12</sup> determined that the note should be treated as money and that an innocent purchaser

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6. Another method by which the seller's duty to perform is separated from the buyer's duty to pay is through the use of a credit card. The Fair Credit Billing Act, 15 U.S.C. §§ 1601-1666 (1976), invalidates waivers of defenses in credit card contracts in those instances in which a card is used to make a purchase of more than fifty dollars within the state where the user resides or within 100 miles of the place where the card was issued. This comment will not discuss credit card transactions.

7. See *infra* text accompanying note 23.

8. See *infra* notes 73-79 and accompanying text.

9. 16 C.F.R. §§ 433.1-433.3 (1982) (effective date May 14, 1976).

10. See *infra* text accompanying notes 52-55.

11. Violations of the FTC rule probably occur most often in the situation where the seller directly refers a consumer to a financial institution.

12. *Miller v. Race*, 97 Eng. Rep. 398 (K.B. 1758).

for value of a negotiable instrument would not be subject to personal defenses.<sup>13</sup> The court, holding that the subsequent purchaser was entitled to payment, reasoned that protecting commercial transactions was in the best interest of society. If a businessman had to be concerned with the negotiability of a note, the effectiveness of the commercial trade system would be hindered. At the time, England needed a reliable method of transferring wealth from one merchant to another, since the modern, widespread use of paper money did not start until 1833.<sup>14</sup>

This principle became known as the holder in due course doctrine. It was codified in the English Bills of Exchange Act of 1882 and the Uniform Negotiable Instruments Law promulgated in the United States in 1896 and quickly adopted by all the states. The Uniform Negotiable Instruments Law was later replaced by the Uniform Commercial Code (UCC). Over the past 225 years, the definition of a negotiable instrument has expanded to include such things as checks, bank drafts, certificates of deposit, and bills of lading, in addition to promissory notes.<sup>15</sup>

### III. THE BEGINNING OF CONSUMER CREDIT AND THE ABUSE OF THE HOLDER IN DUE COURSE DOCTRINE

During the early development of the holder in due course doctrine, consumer credit was non-existent. After World War II, the use of credit to buy personal and household goods grew quickly. The UCC provisions dealing with negotiable instruments and rights of a holder in due course allowed financiers to incorporate into consumer credit transactions an 18th century commercial banking doctrine which had been developed to protect the commercial paper market.<sup>16</sup>

Creditors soon found that, where the use of negotiable instruments was forbidden in consumer transactions,<sup>17</sup> they could easily include a waiver of defenses clause in the sales contract. For all practical purposes, this waiver gives the creditor the same rights as a holder in due course. Another method used to deprive the consumer of his defenses is the vendor-related or purchase money

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13. See definition of personal defenses *supra* note 2.

14. Williams, *Helping The Market To Work: Section 5 Of The Federal Trade Commission Act And Holder In Due Course*, 9 U.C.C. L.J. 137, 140 (1976) [hereinafter cited as Williams].

15. UCC §§ 3-104, 7-104 (1977).

16. Williams, *supra* note 14, at 139.

17. See *infra* text accompanying notes 30 & 36.

loan.<sup>18</sup> In this type of loan, the seller directly refers buyers to a creditor. The loan is considered a direct personal loan, and the creditor's claim remains independent of the sales agreement between the seller and the buyer.

These three financing methods are subject to abuse because they take away the consumer's most effective weapon—nonpayment.<sup>19</sup> These "cut-off" devices allow dishonest merchants to collect money on a sales contract despite their continued breaches of warranty and contract. These unfair practices can be halted without harm to honest businessmen, and the FTC and most states have taken measures to prevent such abuse.

#### IV. JUDICIAL REMEDY—THE CLOSE CONNECTEDNESS DOCTRINE

In 1940, the Arkansas Supreme Court became the first court to limit the holder in due course doctrine. In *Commercial Credit Corp. v. Childs*,<sup>20</sup> the Arkansas court denied the credit company the status of a holder in due course because the court found the company to be too closely connected to the seller. Childs had purchased a car from a dealer who sold the promissory note to Commercial Credit. Childs defaulted on the note, and the credit company repossessed the car. Childs claimed the dealer had made fraudulent misrepresentations which induced him to buy the car. The court upheld the jury verdict for Childs, concluding that the credit company was a party to the transaction because it was too closely connected with the seller-assignor to say that it was, in good faith, an innocent purchaser of the instrument.<sup>21</sup> The credit company had supplied and prepared the forms for the sales contract and promissory note. The assignment of the note was made the same day Childs signed it, and the credit company had prepared the written assignment to itself even before the note had been executed.

Over the last forty-two years, this "close connectedness doctrine" has been used by numerous jurisdictions,<sup>22</sup> but its application is neither universal nor uniform. *Massey-Ferguson Credit*

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18. See definition *infra* note 44.

19. FTC Statement of Basis and Purpose for the Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53,506, 53,509 (1975).

20. 199 Ark. 1073, 137 S.W.2d 260 (1940).

21. *Id.* at 1077, 137 S.W.2d at 262.

22. See, e.g., *Farmers Acceptance Corp. v. DeLozier*, 178 Colo. 291, 496 P.2d 1016 (1972); *Mutual Finance Co. v. Martin*, 63 So.2d 649 (Fla. 1953); *Kaw Valley State Bank & Trust Co. v. Riddle*, 219 Kan. 550, 549 P.2d 927 (1976); *Massey-Ferguson Credit Corp. v. Brown*, 173 Mont. 253, 567 P.2d 440 (1977); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967).

*Corp. v. Brown*<sup>23</sup> is the only Montana case dealing with the doctrine. Mr. Brown purchased a used combine from a Massey-Ferguson retail dealer. To pay for the combine, Brown traded in an older combine and signed a sales contract which contained a waiver of defenses clause. During the sales negotiations, Brown had expressed concern about certain repairs that were needed on the combine he was buying, and the dealer promised to make those repairs. A Massey-Ferguson Credit Corp. representative was present at the time, and he told Mr. Brown, "His [the dealer's] word is good. If he says he is going to fix it, he'll fix it."<sup>24</sup> The combine broke down, and the promised repairs were never made.<sup>25</sup> Mr. Brown made no further payments, and the Massey-Ferguson Credit Corp., the assignee of the contract, repossessed the machine and sued for a deficiency. Massey-Ferguson claimed the waiver of defenses clause gave it the status of a holder in due course and prohibited Mr. Brown from using the breach of contract defense against it.<sup>26</sup> The Montana Supreme Court found the credit company was not entitled to the protection provided to a holder in due course because: (1) the credit company's representative "participated" in the sale, (2) the credit company supplied the blank sales contract, and (3) the contract was executed and assigned at the same time and upon the same instrument.<sup>27</sup>

*Massey-Ferguson* is typical of most of the close connectedness doctrine cases because it leaves the consumer with some unanswered questions. What factors or combinations of factors are necessary before the court will find the seller and creditor "close" enough to deny them holder in due course protection? Were all three factors present in *Massey-Ferguson* necessary to find the seller and creditor closely connected? Would any two factors have been sufficient? What other factors might the court recognize? These unanswered questions leave the consumer in an uncertain position and point out a major weakness in the doctrine. Various courts have used a variety of factors to decide whether a seller and

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23. 169 Mont. 396, 547 P.2d 846 (1976), *appeal after remand*, 173 Mont. 253, 567 P.2d 440 (1977).

24. *Massey-Ferguson Credit Corp. v. Brown*, 169 Mont. 396, 399, 547 P.2d 846, 848 (1976).

25. The dealer went out of business. *Massey-Ferguson*, 173 Mont. at 254, 567 P.2d at 441 (1977).

26. MONT. CODE ANN. § 30-9-206 (1981) provides that an agreement by a buyer that he will not assert against an assignee any claim or defense which he may have against the seller is enforceable, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument.

27. *Massey-Ferguson*, 173 Mont. at 255, 567 P.2d at 441.

a creditor are too closely related.<sup>28</sup> This lack of uniformity has resulted in conflicting results from one jurisdiction to another in cases whose facts are practically identical.<sup>29</sup> These conflicting results and unanswered questions have prompted the majority of state legislatures to attempt to codify the close connectedness doctrine and thereby restrict the holder in due course doctrine in consumer credit transactions.

## V. LEGISLATIVE REMEDIES

### A. *State Legislative Attempts at Remedies*

Forty-five states have enacted legislation dealing with the holder in due course doctrine in consumer credit transactions,<sup>30</sup> but only a few have done so in a comprehensive fashion.<sup>31</sup> Some states have prohibited the use of all negotiable instruments other than checks but continue to allow waiver of defenses clauses,<sup>32</sup> while others have prohibited waivers but continue to allow promissory notes.<sup>33</sup> Very few states have done anything to deal with the vendor-related loan. Five states, including Montana,<sup>34</sup> have no specific statutes preserving consumers' claims and defenses. This inconsistent and incomprehensive protection has led to the need for uniform legislation prohibiting cut-off devices in consumer credit transactions.

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28. Those factors include: (1) common ownership of financier and seller; (2) the financier takes all of the seller's paper; (3) the financier takes only the seller's paper; (4) the financier prepares the instruments which the seller procures the buyer to sign; (5) the financier's name appears on the printed form instrument as endorsee or assignee; (6) the buyer fills out the instrument on the financier's premises, or with an employee of the financier being present on the seller's premises; (7) the financier does all credit checks of the buyer; (8) the financier finances the seller's inventory; (9) the financier has intimate knowledge of the seller's financial condition; and (10) the financier discounts the seller's paper heavily. Axelrod & Barry, *Holder in Due Course—A Memo to Poverty Lawyers*, 22 *RUTGERS L. REV.* 281, 294-95 (1968).

29. Compare *Block v. Ford Motor Credit Co.*, 286 A.2d 228 (D.C. 1972) with *Rehurek v. Chrysler Credit Corp.*, 262 So.2d 452 (Fla. 1972).

30. For a detailed examination of each state's legislation, see Hudak & Carter, *The Erosion of the Holder in Due Course Doctrine: Historical Perspective and Development—Part II*, 9 *U.C.C. L.J.* 235 (1977).

31. See, e.g., *ME. REV. STAT. ANN.*, tit. 9A, §§ 3.307, 3.403, 3.404, tit. 11, § 3-302(5) (1980); *WIS. STAT. ANN.* §§ 422.406 through 422.409 (1974).

32. See, e.g., *OR. REV. STAT.* § 83.650 (1978).

33. See, e.g., *NEV. REV. STAT.* § 97.275 (1979).

34. The other four are Arkansas, Nebraska, Tennessee, and Virginia.

B. *Uniform Legislative Remedy—The Uniform Consumer Credit Code*

The Uniform Consumer Credit Code (U3C), drafted in 1968 and revised in 1974, effectively abrogated the holder in due course doctrine in consumer cases.<sup>35</sup> The 1974 Act contains provisions that specifically deal with all three methods of cut-off devices: negotiable instruments, waiver of defenses clauses, and vendor-related loans.<sup>36</sup>

Section 3.307 of the U3C provides that a creditor may not take a negotiable instrument other than a check. Section 3.404 provides that an assignee of the seller is subject to all claims and defenses of the consumer against the seller, and that the sales agreement may not limit or waive the claims or defenses of the consumer. It also provides that even if a negotiable instrument is used in violation of section 3.307, the holder of that instrument is still subject to the claims and defenses of the consumer. Section 3.405 extends the code's policy of preserving consumer claims and defenses to vendor-related or purchase money loans. This section codifies the close connectedness doctrine and subjects the lender to all claims and defenses of the consumer against the seller if: (1) the lender knows that the seller arranged the credit; (2) the lender is related to the seller; (3) the seller guarantees or assumes the risk of the loan; (4) the lender supplies the seller with the contract forms, and the seller participates in the preparation of the form; (5) the loan is conditioned upon the purchase of property or services from the particular seller; or (6) the lender has knowledge or notice of substantial complaints of the seller's failure to perform his contracts. The consumer must make a good faith effort to obtain satisfaction from the seller, and the assignee's or lender's liability is limited to the amount still owing at the time he learns of the claim.<sup>37</sup>

Unfortunately for Montana consumers, Montana has not adopted the U3C. Only eleven states<sup>38</sup> have adopted it, and eight

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35. The official comment to section 3.307 states that a major tenet of the U3C is that the holder in due course doctrine should be abrogated in consumer cases.

36. The U3C also effectively deals with the problems of holder in due course associated with the use of credit cards. U3C § 3.403 (1974).

37. U3C §§ 3.404(2), 3.405(2) (1974).

38. Colorado, COLO. REV. STAT. §§ 5-1-101 to 5-9-103 (1973); Idaho, IDAHO CODE §§ 28-31-101 to 28-39-108 (1980); Indiana, IND. CODE §§ 24-4.5-1-101 to 24-4.5-6-203 (1982); Iowa, IOWA CODE ANN. §§ 537.1101 to 537.7103 (1982); Kansas, KAN. STAT. ANN. §§ 16a-1-101 to 16a-9-102 (1981); Maine, ME. REV. STAT. ANN. tit. 9A, §§ 1-101 to 6-415 (1980); Oklahoma, OKLA. STAT. ANN. tit. 14A, §§ 1-101 to 9-103 (1972); South Carolina, S.C. CODE ANN. §§ 37-1-101 to 37-6-416 (1976); Utah, UTAH CODE ANN. §§ 70B-1-101 to 70B-11-105 (1980); Wisconsin, WIS. STAT. ANN. §§ 421.101 to 427.105 (1974); Wyoming, WYO. STAT. §§ 40-14-101 to 40-14-702 (1977).



of those states<sup>39</sup> have the 1968 draft which did not cover the vendor-related loan problem. Thus, the lack of protection afforded to consumers in states that failed to enact adequate legislation prompted federal intervention.<sup>40</sup>

## VI. THE FTC HOLDER IN DUE COURSE RULE—PRESERVATION OF CONSUMERS' CLAIMS AND DEFENSES

The FTC holder in due course rule,<sup>41</sup> in effect since 1976, makes it an unfair or deceptive act or practice within the meaning of section 5 of the Federal Trade Commission Act<sup>42</sup> for a seller,<sup>43</sup> directly or indirectly, to take a consumer credit contract or accept as payment the proceeds of any purchase money loan<sup>44</sup> unless the credit contract made in connection with the sale contains a notice that any holder of the credit contract is subject to all claims and defenses which the debtor could assert against the seller of the goods or services.<sup>45</sup> With the required notice in the consumer credit contract, the consumer is protected by state law because the notice becomes part of the contract and the courts will interpret the contract as written.

All three cut-off devices are regulated by the rule. The rule precludes the use of negotiable instruments because any instrument containing the notice would not meet the requirements of negotiability.<sup>46</sup> The rule also prevents the use of a waiver of defenses clause because if the notice is qualified by additional language, the contract no longer "contains" the required notice.<sup>47</sup> Similarly, the

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39. Colorado, Idaho, Indiana, Oklahoma, South Carolina, Utah, Wisconsin, and Wyoming.

40. FTC Statement of Basis and Purpose, *supra* note 19, at 53,506.

41. 16 C.F.R. §§ 433.1-433.3 (1982).

42. 15 U.S.C. § 45 (1976).

43. A seller is defined as a person who, in the ordinary course of business, sells or leases goods or services to consumers. 16 C.F.R. § 433.1(j) (1982).

44. A purchase money loan is a cash advance which is received by a consumer in return for a "Finance Charge" within the meaning of the Truth in Lending Act and Regulation Z, which is applied, in whole or substantial part, to a purchase of goods or services from a seller who (1) refers consumers to the creditor or (2) is affiliated with the creditor by common control, contract, or business arrangement. 16 C.F.R. § 433.1(d) (1982).

45. In *FTC v. Bunte Brothers*, 312 U.S. 349 (1941), the Supreme Court held that the FTC lacked authority over § 5 of the FTC Act to regulate any activity not truly interstate in character. Congress made changes in the FTC Act in 1975. The Federal Trade Commission Improvements Act of 1975, Pub. L. No. 93-637, 201, 88 Stat. 2183 (codified at 15 U.S.C. §§ 41 to 56 (1976)), expanded the FTC's authority to the full extent of the "commerce clause" of the Constitution by changing the term "commerce" to "in or affecting commerce."

46. See *supra* note 4.

47. Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 41 Fed. Reg. 20,022, 20,023 (1976).

reference to purchase money loans (the FTC's adoption of the close connectedness doctrine) prevents the use of vendor-related or purchase money loans as a means of separating the duty to pay from the duty to perform.<sup>48</sup> The FTC rule also goes beyond the remedy afforded by the U3C and allows the consumer to recover amounts already paid under the contract, including a down-payment.<sup>49</sup>

With such an all inclusive and hardhitting regulation protecting consumer interests, it would seem the holder in due course doctrine has finally met its demise in the consumer credit market. But the FTC rule only protects consumers when the required notice is included in the credit instruments. What happens if, contrary to the rule, a seller does not include the notice in a consumer credit contract?

If the FTC finds that a seller has committed an unfair act by not including the required notice in a consumer contract, it can do at least two things: (1) issue a cease and desist order requiring the seller to discontinue the practice;<sup>50</sup> (2) take civil action and seek relief for the consumer. Such action might include one or more of the following: rescission of the contract, reformation of the contract, refund of money or return of property, and the payment of damages.<sup>51</sup>

These remedies have two serious flaws. First, a court order to cease and desist rarely aids the consumer whose contract began the proceedings. Second, the problem the consumer encounters in relying on the FTC to enforce the rule is that the FTC has very limited resources. Although any person may request the FTC to make an investigation,<sup>52</sup> the chance of a positive response is small.<sup>53</sup> With limited resources and budget cuts, the FTC would probably be hesitant to do much for a single party making a complaint, es-

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48. *Id.* at 20,024 (detailed explanation of what types of transactions must contain the notice).

49. The FTC conditions this statement by asserting that this remedy would only be available where a seller's breach was so substantial that a court was persuaded that it was justified. The most typical example of such a case would involve non-delivery, where delivery was scheduled after the downpayment was made. FTC Statement of Basis and Purpose, 40 Fed. Reg. 53,524 (1975).

50. 15 U.S.C. § 45(m) (Supp. IV 1974) (If the seller violates the order, civil penalties of up to \$10,000 can be imposed).

51. 15 U.S.C. § 57b(b) (Supp. V 1975).

52. 16 C.F.R. § 2.1 (1982).

53. The fiscal 1983 budget for the FTC is \$60.8 million. This figure represents an 11.5%, or \$7.9 million, reduction from fiscal 1982. Administration requests for fiscal years 1984 and 1985 are \$55.1 million and \$54.6 million respectively. 561 TRADE REG. REP. (CCH) 47 (Sept. 27, 1982).

pecially in Montana with its sparse population.<sup>54</sup> As a practical matter, the FTC is likely to limit its investigations to cases involving large numbers of affected parties.<sup>55</sup> The dismal prospect of enforcement by the FTC is darkened further by the absence of a private cause of action to enforce compliance with the FTC rule.

#### VII. THE LACK OF A PRIVATE CAUSE OF ACTION UNDER THE FTC HOLDER IN DUE COURSE RULE—THE DOCTRINE OF IMPLICATION

Neither section 5 of the FTC Act<sup>56</sup> nor the FTC holder in due course rule<sup>57</sup> contains any provision for enforcement by private litigants if the required notice is omitted from a consumer credit contract. Through the use of the doctrine of implication, courts have found implied private causes of action under federal statutes that do not expressly provide for such;<sup>58</sup> however, no implied cause of action has been found under the FTC Act. The Court of Appeals for the District of Columbia Circuit, in *Holloway v. Bristol Myers Corp.*,<sup>59</sup> explained why no private cause of action is granted by the FTC Act. The court emphasized that the FTC Act was a product of legislative compromise with its administrative enforcement scheme purposely chosen. The court reasoned that to allow private actions would: (1) pose serious problems to the enforcement activities of the FTC;<sup>60</sup> (2) be inconsistent with the legislative scheme established by Congress;<sup>61</sup> and (3) interfere with the FTC's discretion to encourage voluntary compliance without the need to

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54. In a 1969 report recommending a private cause of action as a supplement to FTC actions, the Senate Committee on Commerce recognized that the limited staff and budget of the FTC would force the agency to allocate its resources to priority cases. The effect would be to leave thousands of valid cases without a legal remedy if consumers are not allowed a private cause of action. S. REP. NO. 1124, 91st Cong., 2d Sess. 16 (1970). The bill, S. 3201, 91st Cong., 1st Sess. (1969), did not pass.

55. According to the FTC, the budget reductions will be reflected in a shift toward devoting its resources on a cost-benefit analysis. 529 TRADE REG. REP. (CCH) 9-10 (Feb. 15, 1982).

56. 15 U.S.C. § 45 (1976).

57. 16 C.F.R. §§ 433.1-433.3 (1982).

58. See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (Securities Exchange Act of 1934); *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956) (Civil Aeronautics Act of 1938); *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969) (The Wagner-Peyser National Employment System Act).

59. 485 F.2d 986 (D.C. Cir. 1973) (Consumers brought a private action against the makers of Excedrin for false advertising).

60. *Id.* at 998. The court maintained that the FTC, with its overview of the national economy, was in a better position than a private litigant to gauge the injury an unfair or deceptive practice would cause the public and to balance this against the likely cost of eliminating the practice.

61. *Id.* at 998.

resort to litigation.<sup>62</sup>

The Court of Appeals for the Ninth Circuit followed the *Holloway* decision in *Carlson v. Coca-Cola Company*.<sup>63</sup> A group of individuals brought an action against the beverage company for an alleged unfair trade practice as defined by section 5(a)(1) of the FTC Act. The court, holding that the Act vested remedial power solely in the FTC, stated: "Section 5(a)(1) equips the Federal Trade Commission with a flexible tool with which to combat unfair trade practices. Consumers cannot transmute that tool into a crowbar for prying open . . . the federal courthouse."<sup>64</sup>

One federal district court<sup>65</sup> has found a private cause of action under the FTC Act. The facts of that case, however, show that the FTC had already issued a cease and desist order and that the private plaintiff was bringing an action to enforce the order. No other court has followed this decision, and at least one court has rejected the holding.<sup>66</sup>

In *Cort v. Ash*,<sup>67</sup> the United States Supreme Court adopted the ground rules for applying the doctrine of implication to federal statutes. The Court held that there are four relevant issues in determining if a private remedy is implicit in a federal statute not expressly providing one: (1) whether the plaintiff is one of the class for whose benefit the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; (4) whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.<sup>68</sup>

The Supreme Court qualified those four criteria in *Middlesex County Sewerage Authority v. National Sea Clammers Association*.<sup>69</sup> The Court said that the key factor to consider is the intent of the legislature:

'It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' [citation omitted]

62. *Id.* at 1002.

63. 483 F.2d 279 (9th Cir. 1973).

64. *Id.* at 281.

65. *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582 (N.D. Ind. 1976).

66. *Bott v. Holiday Universal Inc.*, Civ. No. 75-1982 (D.D.C. 1976).

67. 422 U.S. 66 (1975).

68. *Id.* at 78.

69. 453 U.S. 1 (1981).

In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedy it considered appropriate.<sup>70</sup>

There are certainly no strong indications of congressional intent to provide consumers a private cause of action under the FTC Act. There have been numerous attempts in Congress to amend the FTC Act to allow private causes of action, but all have failed.<sup>71</sup> Therefore, the decisions after *Middlesex* have concluded that the administrative enforcement remedies provided by Congress are the only remedies Congress has considered appropriate.<sup>72</sup> Without a private cause of action under the FTC Act, consumer redress is limited to enforcement by the FTC unless the state in which the consumer lives has adequate consumer protection statutes.

### VIII. MONTANA'S UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT

In 1973, the Montana Legislature adopted the Uniform Unfair Trade Practices and Consumer Protection Act.<sup>73</sup> The Act provides that unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.<sup>74</sup> The Act further provides that due consideration and weight shall be given to the interpretations of the FTC and the federal courts relating to section 5(a)(1) of the FTC Act.<sup>75</sup> The Act gives any person who purchases or leases goods or services primarily for personal, family, or household purposes a private cause of action against the seller or lessor if unfair or deceptive practices are used and result in any ascertainable loss.<sup>76</sup>

It would appear that Montana's Consumer Protection Act pre-

70. *Id.* at 14.

71. *E.g.*, S. 1823, 92d Cong., 1st Sess., 117 CONG. REC. 14,298 (1971); S. 3201, 91st Cong., 1st Sess., 115 CONG. REC. 36,598-600 (1969); H.R. 14,931, 91st Cong., 1st Sess., 115 CONG. REC. 35,275 (1969). *See also* A.B.A., REPORT OF THE COMMISSION TO STUDY THE FTC, 63-64 (1969) (A private right of enforcement was recommended by the ABA). The FTC itself has recognized that consumers should have a private cause of action under the FTC Act. *See Hearings on Senate Bills 2246 and 3201 Before the Consumer Subcommittee of the Senate Committee on Commerce*, 91st Cong., 1st Sess. 9 (1970).

72. *See, e.g.*, *Dreisbach v. Murphy*, 658 F.2d 720 (9th Cir. 1981); *Greenberg v. Michigan Optometric Ass'n Inc.*, 483 F. Supp. 142 (E.D. Mich. 1980); *cf. Miscellaneous Service Workers v. Philco-Ford Corp.*, 661 F.2d 776 (9th Cir. 1981) (not interpreting the FTC Act, but used similar analysis).

73. 1973 Mont. Laws, ch. 275, §§ 1-16 (codified at MONT. CODE ANN. §§ 30-14-101 to -142 (1981)).

74. MONT. CODE ANN. § 30-14-103 (1981).

75. MONT. CODE ANN. § 30-14-104 (1981).

76. MONT. CODE ANN. § 30-14-133 (1981). The court may award up to three times the actual damages and reasonable attorney fees.

vents the use of negotiable instruments and vendor-related loans in consumer transactions, since the FTC holder in due course rule prevents their use and the Montana Act provides that due consideration and weight shall be given to the interpretations of the FTC. There is a strong argument, however, that the Montana Act would not be interpreted as providing this type of protection.

The Uniform Unfair Trade Practices and Consumer Protection Act,<sup>77</sup> from which Montana's version was adopted, contains a section which specifically forbids the use of cut-off devices in consumer credit transactions.<sup>78</sup> When Montana adopted the Act, the legislature amended the Uniform Act by deleting the section dealing with cut-off devices.<sup>79</sup> The rest of the Uniform Act was adopted with only minor changes. Such action is a strong indication that the intent of the legislature was that the Act was not intended to apply to cut-off devices, even if the FTC rules that they are an unfair practice. If that is the case, the consumer is again left without a remedy, or, at best, has the unenviable task of convincing a district court that the Montana Consumer Protection Act was meant to prohibit cut-off devices in consumer credit contracts.

## IX. CONCLUSION

Consumers and businesses alike benefit from the practice of selling credit contracts to financial institutions. It becomes an unfair trade practice, however, when the consumer's obligation to pay is separated from the seller's duty to perform. When the seller uses promissory notes, waiver of defenses clauses, or vendor-related loans, the consumer is deprived of his most effective weapon—nonpayment. The consumer is obligated to pay the holder of the contract or negotiable instrument even if the seller has not performed. The consumer's only remedy, then, is to sue the original seller. The cost of such a suit may be prohibitive, and in many situations the seller turns out to be judgment-proof.<sup>80</sup>

The FTC holder in due course rule prevents this separation of duty to pay from duty to perform by requiring the inclusion in the credit contract of a statement that makes the holder of the contract subject to all claims and defenses which the debtor could as-

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77. UNIFORM UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT § 9 (1970), reprinted in 29 COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION 141 (1970).

78. *Id.*

79. House Journal, 43rd Sess. 133 (1973).

80. This is most likely to happen in just the type of situation that brought on the problem. The seller will not or cannot remedy the problem because he is insolvent, out of business, or bankrupt.

sert against the seller. The FTC rule does not provide for a private cause of action, however, and if the credit contract does not contain the required statement, the consumer is left without an effective remedy.

It would be a simple matter for Montana to provide a private cause of action for this type of unfair trade practice. The legislature could insert the section of the Uniform Unfair Trade Practices and Consumer Protection Act that prohibits cut-off devices into Montana's version of the Act.<sup>81</sup>

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81. It would be best to redraft the section so that it clearly covers the vendor-related loan situation.